

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

FILED

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CLERK, U.S. DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
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DEPUTY CLERK

LISA TORREY, KATHRYN KOCUREK,  
Individually and on behalf of the Estate of  
J. DAVID KOCURE, PH.D.; LANA BARNES,  
Individually and on behalf of the Estate of AL  
BARNES; AMY HENNEKEN; JANE POWELL;  
CAROL FISCH; CHRISTOPHER VALERIO;  
STEVEN WARD; RANDY SYKES; BRIENNA  
REED; ROSETTA FULLER; ADRIANA  
MONTIERO MOREIRA; JESSICA McKINNIE;  
KRISTINE WOODARD; GAIL MEADS; DR.  
MICHAEL FUNDENBERGER; GAYLE  
CLARKE; ALLISON LYNN CARUANA;  
CHLOE LOHMEYER; MAX SHINDLER;  
TAWNYA DAWN SMITH, Individually and as  
Next Friend of MONET PITRE; MIKE  
PEACHER, Individually and as Next Friend of  
ASHLEIGH PEACHER; ALARIE  
BOWERMAN, Individually and as Next Friend  
of ELISA BOWERMAN; EMORY  
BOWERMAN; and ANAIS BOWERMAN.

*Plaintiffs,*

v.

INFECTIOUS DISEASES SOCIETY OF  
AMERICA; BLUE CROSS AND BLUE  
SHIELD ASSOCIATION; ANTHEM, INC.;  
BLUE CROSS AND BLUE SHIELD OF  
TEXAS; AETNA INC.; CIGNA  
CORPORATION; KAISER PERMANENTE,  
INC.; UNITED HEALTHCARE SERVICES,  
INC.; UNITED HEALTHGROUP  
INCORPORATED; DR. GARY P.  
WORMSER; DR. RAYMOND J.  
DATTWYLER; DR. EUGENE SHAPIRO;  
DR. JOHN J. HALPERIN; DR. ROBERT  
B. NADELMAN; DR. LEONARD  
SIGAL; and DR. ALLEN STEERE.

*Defendants.*

Civil Action No.

**A18MC0525 RP**

**NON-PARTY TEXAS MEDICAL BOARD'S  
OPPOSED MOTION TO QUASH SUBPOENA TO  
PRODUCE DOCUMENTS AND NOTICE OF OBJECTIONS**

TO THE HONORABLE JUDGE OF SAID COURT:

Pursuant to Federal Rule of Civil Procedure 45(d)(3)(A)(iii), non-party the Texas Medical Board (TMB) files this opposed Motion to Quash the “Subpoena to Produce Documents, etc.” (Subpoena) served on it on May 28, 2018. *See* Exhibit A attached hereto. The Subpoena was served by the captioned Plaintiffs, who are also plaintiffs in *Lisa Torrey, et al. v. Infectious Diseases Society of America, et al.*, Civil Action No. 5:17-CV-00190-RWS, which is pending in the United States District Court for the Eastern District of Texas. Pursuant to Federal Rule of Civil Procedure 45(d)(1), this motion is being filed in the district in which compliance is required, the United States District Court for the Western District of Texas, Austin Division.

**MOTION TO QUASH**

**A. Standard**

Under Federal Rule of Civil Procedure 45, a district court “must quash or modify a subpoena that “requires disclosure of privileged or other protected matter, if no exception or waiver applies.” Fed. R. Civ. P. 45(d)(3)(A)(iii).

**B. Privileged Information**

The TMB requests this Court to quash the subpoena because the information requested is confidential pursuant to § 164.007(c) of the Texas Medical Practice Act (MPA), which provides:

Each complaint, adverse report, investigation file, other investigation report, and other investigative information in the possession of or received or gathered by the board or its employees or agents relating to a license holder, an application for license, or a criminal investigation or proceeding ***is privileged and confidential and is not subject to discovery, subpoena, or other means of legal compulsion for release to anyone other than the board or its employees or agents involved in discipline of a license holder.*** For purposes of this subsection, investigative information includes information relating to the identity of, and a report made by, a physician performing or supervising compliance monitoring for the board.

Tex. Occ. Code § 164.007(c) (emphasis added).

The records which are potentially responsive to the subpoena include investigation files which are expressly exempt from disclosure, discovery, subpoena, or other means of legal compulsion. *See* Affidavit of Scott Freshour attached hereto as Exhibit B.

The records which are potentially responsive to the subpoena also include reports to the National Practitioner Database (NPDB). That material is confidential under federal law, which provides:

Limitations on disclosure. Information reported to the NPDB is considered confidential and shall not be disclosed outside the Department of Health and Human Services, except as specified in §§ 60.17, 60.18, and 60.21 of this part. Persons and entities receiving information from the NPDB, either directly or from another party, must use it solely with respect to the purpose for which it was provided. The Data Bank report may not be disclosed, but nothing in this section will prevent the disclosure of information by a party from its own files used to create such reports where disclosure is otherwise authorized under applicable state or Federal law.

45 C.F.R. § 60.20(a). The exceptions specified in 45 C.F.R. § 60.17, 60.18 and 60.21 do not apply. *See also* 42 U.S.C. § 1396r-2(c) (Secretary shall provide for suitable safeguards for the confidentiality of the information). *See also* Exhibit B (Freshour affidavit).

Disclosing any NPDB report in an investigative file or otherwise gathered by the TMB would violate the confidentiality provisions of 45 C.F.R. § 60.20 and 42 U.S.C. § 1396r-2.

The only exceptions to confidentiality are Agreed Orders, Remedial Plans, and Physician Public Verification, which are available on the TMB's website. The TMB will provide those documents to Plaintiffs' counsel.

### **NOTICE OF OBJECTIONS**

The TMB hereby notifies Plaintiffs, through their counsel, of the aforementioned objections to the Subpoena pursuant to Rule 45(d)(2)(B) of the Federal Rules of Civil Procedure.<sup>1</sup>

### **PRAYER**

The TMB respectfully requests this Court to quash the Subpoena for the reasons listed above. The TMB further prays for such other and further relief, both general and special, at law and in equity, to which it may be justly entitled.

Respectfully submitted,

KEN PAXTON  
Attorney General of Texas

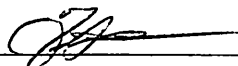
JEFFREY C. MATEER  
First Assistant Attorney General

JAMES E. DAVIS  
Deputy Attorney General for Civil Litigation

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<sup>1</sup> Plaintiffs' counsel agreed in writing that the deadline for submitting Rule 45 objections is extended to June 22, 2018.

NICHOLE BUNKER-HENDERSON  
Chief, Administrative Law Division



Ted A. Ross

State Bar No. 24008890

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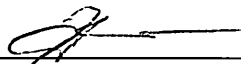
Facsimile: (512) 456-4372

[ted.ross@oag.texas.gov](mailto:ted.ross@oag.texas.gov)

*Attorneys for the Texas Medical Board*

### **CERTIFICATE OF CONFERENCE**

I hereby certify that the undersigned made a good-faith attempt to resolve this matter by conferring on the telephone with Plaintiffs' counsel, who stated that he opposes this motion.

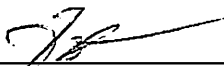


Ted A. Ross

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been served on the following counsel via e-mail and electronic service on June 22, 2018:

Daniel R. Dutko  
Hanszen Laporte, LLP  
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*Attorneys for Plaintiffs*

  
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Ted A. Ross